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No. 22060

FILED

#### IN THE

# United States Court of Appeals 1967

FOR THE NINTH CIRCUIT WM. B. LUCK, CLERK

SCANBE MANUFACTURING COMPANY,

Appellant,

v.

WM. TRYON AND THE U.S. MARSHAL,

Appellees.

MOTION FOR ORDER PERMITTING FILING OF BRIEF AMICUS CURIAE UNDER RULE 18-9(a)

and

BRIEF AMICUS CURIAE

Lewis E. Lyon 811 West Seventh Street Los Angeles, California 90017



WM. B. LUCK, CLERK



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# MOTION FOR ORDER PERMITTING FILING OF BRIEF AMICUS CURIAE UNDER RULE 18-9(a)

and

#### BRIEF AMICUS CURIAE

The undersigned hereby moves this Court for an Order permitting the filing of the attached Brief Amicus Curiae in this cause. This motion is based upon the fact that the ruling of the District Court in this matter is such as to cast a serious cloud upon all processes and writs of the District Court now extant and upon the belief that if this District Court ruling is allowed to stand all writs heretofore issued out and under the seal of the Clerk of the District Court are void per se and unenforceable to any extent.

The undersigned is an attorney duly licensed to practice before this Court and has been practicing before the District Court of the United States, Southern District of California, and this Court for the last forty years. In such practice he has obtained and has in pres-

ent force injunctions in patent cases which have been issued under the authority of the District Court Judge but have been issued under the Seal of the Court and signed by the Clerk thereof. Such injunctions have not been signed by the District Judge. It is believed by the undersigned that there was a precise failure of counsel for the parties before the District Court to bring before the Court the authority under which such issuance of process and writs is had, namely, the provisions of Section 1691 U.S.C., Title 28, and that it was this failure which resulted in the ruling of the District Court that injunctions so issued were void per se and therefore in all respects unenforceable.

As a further reason underlying this Motion the undersigned represents to this Court that in filing this Motion and Brief Amieus Curiae he is responding to a request made by a District Judge that he appear and file a brief in this matter amieus curiae.

It is respectfully requested that this Court Order that the accompanying Brief Amicus Curiae be filed in this matter.

Respectfully submitted,

By Lewis E. Lyon

SO ORDERED:

Richard H. Chambers Circuit Judge

Subject to reconsideration if any objection filed within 1 days.

#### IN THE

## United States Court of Appeals

#### FOR THE NINTH CIRCUIT

SCANBE MANUFACTURING COMPANY,

Appellant,

v.

WM. TRYON AND THE U.S. MARSHAL,

Appellees.

#### BRIEF AMICUS CURIAE

This Brief is filed by the undersigned amicus curiae because it is believed to involve a question of fundamental importance to each and every practicing attorney before the District Court of the Southern District of California who has been instrumental in obtaining injunctive relief from that Court, and who in the exercise of his duties as an attorney has obtained for his client or clients a Writ of Injunction and may be in a position of being required to enforce that Writ.

This Brief is directed to a ruling of the District Court set forth in its Memorandum and Order herein signed May 29, 1967, which states at page 4, lines 11 to 14 thereof:

"... I am of the view that a judgment of contempt based upon the violation of an injunction that is void *per se* cannot stand and that petitioner's custody is therefore unlawful."

and to that portion of the Order which states at page 3, lines 18 to 21 thereof:

". . . Absent some clear authority, which has not been brought to my attention, I am of the view that the injunction signed only by a deputy clerk of the District Court is void."

Before issuing its Memorandum and Order in this cause signed by the Judge May 29, 1967, it is apparent from the said Memorandum and Order in the portion thereof as hereinabove set forth that the District Court had sought authority under which the injunction was signed by the Deputy Clerk and not by the District Judge. This is further apparent from that portion of the Memorandum and Order signed May 29, 1967, by the District Judge herein, wherein it is stated at page 2, lines 1 to 5 thereof:

"... Upon review of the documents then filed this Court noted that the above mentioned injunction was not signed by a District Judge, but rather was undated, and signed by a deputy clerk of the United States District Court. . . ."

At no place in the record of this cause is reference made to the controlling statute with respect to the signing, sealing and issuance of processes and writs which is Section 1691 of U.S.C. Title 28. It is clearly this omission which is responsible for the Court's holding in this cause.

Section 1691 of U.S.C. Title 28 states:

"All writs and process issuing from a court of the United States shall be under the seal of the court and signed by the clerk thereof."

The provisions of this section are unequivocally clear and no other section of the Statute provides for the mode, manner or signature of a Writ of Injunction issuing out of the District Court.

The injunction was issued by the Clerk under the Seal of the Court and signed by the Clerk in accordance with Section 1691, supra.

The Clerk issued the injunction pursuant to the provisions of the Judgment of the District Court, which Judgment was lodged with the Clerk on January 6, 1966. The terms of the Injunction issued by the Court under the Seal of the Court and signed by the Deputy Clerk conforms precisely with the terms of that Judgment, i.e., that defendant was enjoined from infringing one or more of the claims of Letters Patent Reissue 25,595 owned by the plaintiff for the remainder of the term of such patent. (Interlocutory Findings of Fact and Conclusions of Law Re Civil Contempt, page 1, lines 27 to 32 thereof).

The precise terms of the Injunction is thus fixed by and under the Judgment of the District Court signed by the District Judge and this fact is not challenged nor is the same in issue.

Rule 65 of the Federal Rules of Civil Procedure subsection (d) thereof further provides:

"Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise."

It is not disputed that Wm. Tryon had actual notice and personal service of the Writ of Injunction. This Court on a patent contempt ruling in *Union Tool Company v. Wilson*, 265 F. 669, C.A. 9, May 17, 1920, entered its ruling with respect to matters of both civil and criminal contempt and this ruling was affirmed by the Supreme Court in 259 U.S. 107, where at 113 the Supreme Court stated:

"... Knowing of the injunction, it would have been bound to obey it even if no writ had issued...."

The District Court in its Memorandum recognizes the validity of this ruling wherein it states:

"The argument is pressed, however, that even a void injunction must be obeyed until it is overturned on appeal. As a broad proposition that is undoubtedly true (See: Howat v. Kansas, 258 U.S. 181, 189-190; United States v. United Mineworkers of America, 330 U.S. 258, 293-294)." (Memorandum and Order signed May 29, 1967, page 3, lines 22 to 26).

It is apparent that the District Court predicated its ruling solely upon the reasoning that the Writ of Injunction issued is void per se because it was not signed by a District Judge but was signed solely by the Deputy Clerk. Thus, as hereinabove quoted the Court's ruling is based upon the failure to bring to its attention the authority under which the Writ was granted and because of that failure the District Court ruled that the Writ of Injunction so issued was void per se. It is therefore respectfully submitted that this Court must reverse the ruling of the District Court that the Writ of Injunction as issued was void per se.

It is further respectfully submitted that as the Writ of Injunction as issued was not void per se the District Court's Memorandum and Order must be reversed in its entirety.

Respectfully submitted,

By Lewis E. Lyon Amicus Curiae

#### CERTIFICATE

I certify that in connection with the preparation of this Brief I have examined Rules 18 and 19 of the United States Court of Appeals for the 9th Circuit and in my opinion the foregoing Brief is in full compliance with those rules.

This Motion and Brief Amicus Curiae was served upon each of the following at the addresses given by mailing a true and exact copy thereof on this 1st day of December, 1967.

By LEWIS E. LYON

CHRISTIE, PARKER & HALE 201 South Lake Avenue Pasadena, California 91101

Attorneys for Scanbe
Manufacturing Corporation

WM. MATTHEW BYRNE, JR. United States Attorney

Frederick M. Brosio, Jr. Asst. U.S. Attorney Chief, Civil Division

LARRY L. DIER
Assist. U.S. Attorney
600 U.S. Court House
312 North Spring Street
Los Angeles, California 90012

and

Gean W. Cannon 412 West Sixth Street Suite 301 Los Angeles, California 90014

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WHEN PLAISIFF, went to lie. Frericks, for doctors care in lovember 1958, when risintiff hearing in his right ear be ain to fail him, A. G. (AL) Vinyard, Supervisor in charge, made el intiff to to PA. Frericks, before the fa. had time to complete him andination on the rlaintiff, and request a ritter stat ent fro the li. as to the lintiff condition, and if the Fl in i.f return d from the fil. without this ritter st ten at, the listiff we told by r. Vinyard that laintiff would be in diron his job.

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PLAINTIFF, took this matter up with Vernon Case, Secretary Treasure, of the Teamsters Union Local 274, which Plaintiff is a Brother member, Vernon Case told Plaintiff, If you cant do as your Boss tells you to, you will just have to go some place else and work. Then Plaintiff took this matter up with DR. Frericks, DR. Frericks got upset and stated, That, he has not had time as yet to make a true statement, that he was not through with runing his test, but to keep the Plaintiff from being fired, the DR. wrote a statement and give it to the Plaintiff, and the Plaintiff give this state ement to Mr. Vinyard. The next week Mr. Vinyard told Plaintiff that he had reveived a letter from the main office in Los Angeles, and that they had examined the statement from DR. Frericks, and they find that there is nothing wrong with Plaintiff, and if Plaintiff continues on with his treatements with the Doctor, that the Plaintiff would be fired from his job. Mr. Vinyard said, I request you get them insurance pappers filled out and turned in. Mr. Vinyard said, we have to do checks like this to keep these quack DR. from running up big DR. bills on these insurance co. which makes it hard on our company.

PLAINTIFF, is deff in his right ear today, without being given a fair chance by medical care. Plaintiff request TEN HUNDRED THOUSAND DOLLARS, from each, the Teamsters Union, and Hostess Cake Co. of Continental Baking Co. for the relief of injury, suffering from the violation of this Act of Law.

LABOR LAW HANDBOOK---PAGES 149, 150 UNFAIR LABOR PRACTICES.

310. RIGHTS OF EMPLOYEES-SECTION 7. Sec. 8(a)(3) 8(b)(2). PLAINTIFF, states, on July 06, 1963, when Plaintiff was told by his Supervisor, Jack Rowse, for Plaintiff not to return to work anymore, staiting, that the Salesmanager, Edward Flipowicz, said, give no reason, as the reason for his firinf, this constitutes a Breach of Contract and Unfair Labor Practice. and when Mr. Case refused Plaintiff, the Union is Liable, and when Mr. Eagelton, from the State Labor Board, refused Plaintiff, the State of Arizona is Liable, and when Mr. Cherry, from the National Labor Relation Board,

ALLEYING SOOK SAIR patient up with Poyour Core, margins of the Temperate Dwing Level 27th, wellen Planette I. white aming, Veryon Core told Flatablilly, If you care you as tell a year to pay the payer for an acres plants of the same plants of the ericker not memor, and marked, water, he has not had there -- -- -the a time state of the course out the course of the course of a sold a sold to the large blue statement True before these, the to even and seems at the give is the their time and the filther the mile of the filth the and the fire Virginia, The stark wash in. Vignal told Flattering conthe properties and the soft to make with born toward a developer but on they and equations the statement from the year on the and board binners for noticing whom which exactly and it was in milenam on with a seminary the site of the are noticed to them being the . We. We. We. I will be the the I then dandence the season was not been been been and the state of the state of 1d, we note to do const lim told to Feet whom duce . . . . . . . . mains up blo DA. bills on these bentiment to which taller I -our newpany.

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311. EXPLOYER OF AIR LADON PERCENCES-VEGER S (N)(1).

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WHEN, Eastess Cake Co. of Continental Library 1st build uppervisor, fire Plaintiff, the Co. is Liable upper all aticle, and when the Secentary Treesure, of the Peanster Wion, upper force against Plaintiff in this course of ection, the Inion is Liable under this Article.

PLAINTIFF, request relief of injury of the book of the book of the book of the constant of the same of the continental Baking Co., for the relief of injury, suffered in the violation of this Art. and its action.

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315. INDIVIDUAL \_4 .. AL INT. SECTION 9(4)8(4)(5).

when, laintiff was fired July 06. 176, from jol. With Hostess Cake Co. of Continental kin co., laintiff tri to bargin with the Union, with Lostess Cake Co. of Continental inches. Seeked recress from the State Labor and from the State Labor and from the State Labor action oard, and private Counsel. Ostes Color to the inental aking Co. and the learnsters Union, r fusor to ve out heir mouth in an effort to bargin.

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Hull, Plaintiff, requested a council hereing real rding his illeagle firing. July 06, 1963, and the action of the ecretary treasure, of the Teamsters inion, Vernon Case, denial plaintiff a Counsel meeting, and when Plaintiff attended the regular counsel meeting on september 11 or 12, 1963. Vernon Take concilled the meeting, and the United Brotherhood of the easters Union sent Plaintiff a letter, closing this matter against a intiff without giving Plaintiff a fair hearing, and Vernon Case of the Teamsters Union, and Toward Tipowicz, of Bestess Cake Co. of Continental Paking Co. Interfered with Plaintiff getting a job with Carnation Foods, after remakins, of Carnation Foods had hired Plaintiff.

PLAINTIFI, request relief of injury of the Law.

LALUE LA LE DECOK-PAGE 238 UNFAIR LABOR PRACTICES.

319. UNION UNFAIR LABOR PRACTICES-S. CILLE 8 (b)(3)-

reason for his firing from Fostess Cake Co. of Continent 1 aking Co. of July 06. 1963, and collect Plaintiff sick pay which the Co. owes Plaintiff, when Plaintiff was off sick, under roctors care. I the last part of May and the first part of June, of 1963, for 19 days, the Union refused to collect, and the Co. refused to pay Fl intiff.

PLAINTHE, request relief of injury of 100 to 100 All DOLLAS, from each, the leamsters Union, and losters ake Co. of Continental Laking Co. for the relief of injury suffer from the Violations of this orticle and Section of the Lew.

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sters Union, and Edward Plajoricz, of Lostess Cale to. of Continental Beking Co., took a bribe from ... Llator to have Plaintleff fired, and the Union, Lostess Cake Co. of Continental Lincon, the State Labor Loard, the Sational Labor elation ord, and the Veterian Adminstration, took no course to redress this wrong against Plaintiff, this constitutes a violation of the above Article and lection of the Law.

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10E VIOLATION OF SECTION 8(b)(4) .ec. 303 (a)(b) 303.3

with out being given a just cause, and Plaintiff, went to the above despondents, in the above name case, for redress of griev ne s, and was denied by all. This constitutes a violation of the above rticle and Jections of the above name Law.

PLAIR IFI, request relief of injury of 12 1012 12 Cake to. of Continental Laking Co., for the relief of injury suffered from the violation of these Article and Lection of the Law, and Laintiff, request the other espondents be charged with, violation of the U. . . .

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aking Co., and Vernon Case, of leasters Union, reced those men to sign that letter against Plaintiff, under a treat of being fired, and droped on the street from the mion, to t constitutes a violation of the above Articles of Law.

PLATELIFF, request relief of 1 jury of 15 June 100 DOLLARS, from each, the Teamsters Union, and Jostess Lake Lo. of Continental Baking Lo., for relief of injury suffered from the violation of these Articles and Jecticus of the Lo., and Flaintiff, request the other respondents, be charged with violation the Purchase (OR SPI II) of Amendments, of the Constitution of the U.

ARILO A REVI'LL SECTION 10.-31 - 1/62 481 23-1361. ANTICLE 4. LA LI L.

WHIT, Vernon Case, of the Teamsters John, and dward lipewicz. of Lostess Cake Co. of Continental Laking Co., forced those men to sign letters against Flaintiff, and spreaded remors against Plaintiff, that constitutes a violation of the above rt. of Law. PLAI IIIF, request relief of injury of a particle of Lostess Cake Co. of Continental Laking Co., for the relief of injury for the violation of the above Article of Law.

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Plaintiff. so Plaintiff essurance of fair treatment.

planting, request relief of injury of O - ILLIO - LLA , per State, for the relief of injury suffered from the rematers Urion, in the violation of this act. From the removale of the Flag, of the U. . A. from the resters pion.

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PLAINTIFF, request relief of injury of The United Particles of Continental Paking Co., for relief of injury surface of the violation of this of law.

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The Charles of Bill Or Mile . Line . to all intirf, wit not be denied or mistreated. and the treat is or the constitution has guarded well against that.

PLANTIE , request relief of injury and I. D. L. S. from each, the tate of Arizona, and the United to te of Merica. for the relief of injury, suffered from the violation of the junior the above need respondent.

RELIEF, of injury is baised upon the loss of waiges and benifits, from July 06, 1963, untill retirement, and beyound the blessing

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Monday, Mann Gill

STATE OF ARIZONA COUNTY OF MARICOPA

This instrument was acknowledged before me this // day of

Dec , 1967, by author S. Barkley

In witness whereof I herewith set my hand and official seal.

- NOTARY PUBLIC

My Commission E, pires Oct. 15, 1971

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